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IN THE

# Supreme Court of the United States

No. 9—OCTOBER TERM, 1951

DONALD R. DOREMUS and ANNA E. KLEIN,

*Appellants,*

*vs.*

BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE and THE STATE OF NEW JERSEY,

*Respondents.*

On Appeal From the Supreme Court of the  
State of New Jersey

## BRIEF FOR APPELLANTS

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## **Opinions Below**

The opinion of the Supreme Court of New Jersey (R22-38) is reported at 5 N. J. 435, 75 A. 2d 880. This opinion affirmed a decision of the Superior Court of New Jersey, Law Division, whose opinion (R7-20) is reported in 7 N. J. Super. 442, 71 A. 2d 732.

## **Jurisdiction**

The judgment and mandate of the Supreme Court of New Jersey was entered on October 16, 1950 (R21). An order allowing appeal to the Supreme Court of the United States was made by Mr. Justice BURTON on January 12, 1951, and filed January 19, 1951 (R38). A Statement as to Jurisdiction having been filed with this Court in accordance with Rule 12, on March 12, 1951, this Court made its order in which further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm was postponed to the hearing of the case on the merits (R43). The jurisdiction of this Court rests on 28 U. S. C. 1257 (2).

## **Statutes Involved**

The statutes involved are Revised Statutes of New Jersey (1937) 18:14-77 and 18:14-78.

R.S. 18:14-77 provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes

at the opening of the school on any school day; in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R.S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First and Fourteenth Amendments to the United States Constitution provide in part:

I. "Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; \* \* \*"

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### Questions Presented

Whether Title 18, Section 14-77 of the Revised Statutes of New Jersey, which requires the daily reading of a portion of the Holy Bible known as the Old Testament in each public school classroom of the state is repugnant to the First and Fourteenth Amendments of the United States Constitution.

Whether Title 18, Section 14-78 of the Revised Statutes of New Jersey, which permits the repeating of the Lord's Prayer and the reading of the Bible in the public schools of the state is repugnant to the First and Fourteenth Amendments of the United States Constitution.

### **Specification of Errors**

Plaintiffs maintain that the Supreme Court of New Jersey erred:

1. In affirming the judgment of the Superior Court of New Jersey, Law Division, which granted the defendants' motion for summary judgment and denied the plaintiffs' motion for summary judgment.

2. In holding and concluding that Title 18, Section 14-77 of the Revised Statutes of New Jersey does not contravene the First Amendment and the Fourteenth Amendment of the United States Constitution.

3. In holding and concluding that Title 18, Section 14-78 of the Revised Statutes of New Jersey is not contrary to the provisions of the First and Fourteenth Amendments of the United States Constitution.

4. In holding and concluding that the Old Testament of the Holy Bible is not a sectarian book and its reading not a religious service or exercise within the prohibition of the establishment of religion clause of the United States Constitution.

5. In holding and concluding that the Lord's Prayer is not sectarian and not a religious service or exercise contrary to the provisions of the First and Fourteenth Amendments of the United States Constitution.

6. In failing to prohibit and restrain the defendants from observing the provisions of the aforesaid statutes and from engaging in the practices therein set forth.

### Statement

Two statutes of the State of New Jersey are involved in this appeal. The first prescribes the daily reading without comment of at least five verses from the Old Testament in every public school classroom in the state; the second excepts from a general provision against religious services or exercises in public schools of the state such reading from the Holy Bible and also the reciting of the Lord's Prayer. The defendants are the State of New Jersey and the Board of Education of the Borough of Hawthorne. Plaintiffs are citizens and taxpayers of the State of New Jersey and the plaintiff Anna Klein is the mother and person standing in *loco parentis* of a student in one of the public schools of the defendant Borough of Hawthorne. Their suit is for a declaratory judgment declaring the statutes unconstitutional under the First and Fourteenth Amendments to the United States Constitution and for an injunction restraining the defendants from engaging in the unconstitutional practices. The existence of the statutes, compliance therewith, the fact that the schools of the Borough of Hawthorne are supported by public funds of the State of New Jersey and of the School District in question are admitted; it was also stipulated that upon request any student might be excused from class during such reading of the Bible and that in this case neither the parents or the child asked to be excused (R5-6). The plaintiffs' standing in Court to pursue the cause of action was also eliminated from consideration; the defendant State of New Jersey raised this question by its second separate and affirmative defense

in its answer (R4) and withdrew it in the pre-trial conference order (R6). The matter came on to be heard in the first instance on countermotions for summary judgment on the pleadings and all formal requirements were waived by both parties (R5), so that the single question before the Court was whether the statutes in question are contrary to the Constitution of the United States. The trial Court decided that they were not unconstitutional, denied plaintiffs' motion for summary judgment, and granted defendants' motion for summary judgment (R6-7). This decision was affirmed by the Supreme Court of New Jersey (R21).

### **Summary of Argument**

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof \* \* \*". Decisions of the Supreme Court of the United States have determined (a) that this provision of the United States Constitution has been made applicable to the states by the Fourteenth Amendment; and (b) that this constitutional provision forbids not only governmental preference of one religion over another, but also impartial governmental assistance of all religions. These constitutional provisions prohibit a state from passing laws which aid one religion, aid all religions, or prefer one religion over another. The statutes of the State of New Jersey here in question, which prescribe regular daily reading in public school classrooms of portions of the Old Testament and which permit the reciting of the Lord's Prayer in such classrooms, utilize the compulsory education machinery of the state to engage in religious services and exercises and thus aid one religion or several religions and prefer one religion over another. The Old Testament

of the Holy Bible is a religious and devotional book which is the basis of the Christian and Jewish religion. Its reading, in the form set forth in the statute, is a religious ritual which constitutes an establishment of religion and an interference with the free exercise thereof. The Lord's Prayer is a sectarian prayer and its reading is a religious exercise and service. There are numerous versions of the Old Testament, each of which is considered the true Word of God by a particular group or sect and repudiated as unauthentic or heretical by others. The reading of any particular version of the Old Testament, the selection of which under the statute is left to the discretion of a particular school board or a particular teacher, is *ipso facto* a preference for the religious group which recognizes that particular version and a discrimination against all other religious groups as well as against the unbelieving. That any student may withdraw from the classroom during such reading, at the whim of the school board, does not render the statute less discriminatory, but is actually evidence that the practice is improper. The religious practices here involved are such an intermingling of religion and government as are clearly repugnant to the First and Fourteenth Amendments of the United States Constitution as definitively interpreted by decisions of this Court. Objections to such practices do not evince a hostility to religion nor are they an attack upon God, upon religion, nor upon the Bible, but are an attempt to preserve the respective functions of government and of religion, each in its own sphere, and to maintain that wall of separation between church and state which is beneficial and essential both to government and religion.

## POINT I

The meaning and intent of the "Establishment of Religion" provision of the First Amendment have been clearly defined by recent decisions of the United States Supreme Court.

The basic American principle of the separation of church and state, crystallized in the First Amendment of the United States Constitution, has received extensive consideration by this Court within the past few years in two important cases: *Everson v. Board of Education*, 330 U. S. 1 (1947) and *McCollum v. Board of Education*, 333 U. S. 203 (1948).—There the Court conclusively defined certain basic principles which can no longer be the subject of controversy. These principles are applicable to the case at bar and it would be an act of supererogation to do more than merely restate these premises here.

First, the Court determined definitively that the restrictions upon Congressional action involved in the First Amendment were made applicable to state action by the Fourteenth Amendment. With respect to the other provisions of the First Amendment the Court had previously decided that the Fourteenth Amendment channeled those provisions to the states. *Gitlow v. New York*, 268 U. S. 652 (1925); *Hamilton v. U. of Calif.*, 293 U. S. 245 (1934); *Minersville v. Gobitis*, 310 U. S. 586 (1940), and *United States v. Ballard*, 322 U. S. 78 (1944). In the *Everson* and *McCollum* cases the Court held that the Fourteenth Amendment made the establishment of religion clause applicable to the states. This holding of this Court is too recent to require reargument here: the point was extensively argued and clearly decided in the *Everson* case; in the *McCollum* case the Court was asked to distinguish or overrule its holding in this respect but refused to do so,

to quote Mr. Justice BLACK, "after giving full consideration to the arguments presented" (at 211).

Secondly, both the *Everson* and *McCullum* cases held that the First Amendment forbids not only governmental preference of one religion over others, but also an impartial governmental assistance of all religions. This extensive scope of the First Amendment was recognized both by the majority and the minority of the Court in the *Everson* case and reiterated in the *McCullum* case. The wide scope of the ban of the First Amendment was summed up in the *Everson* case, and re-affirmed in the *McCullum* case, as follows:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or for professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' " (*McCullum*, at 210.)

Plaintiffs consider these two points, at least, as definitely established and beyond the necessity of further consideration in this case. In doing so, plaintiffs are not relying merely upon the principle of *stare decisis*,

but upon the premise that the points were strenuously argued and conclusively decided so recently and so firmly that further reargument to reestablish the principles and confirm the logic upon which the Court based its holding would be gratuitous and presumptuous.

## POINT II

**The First Amendment (as applied to the states by the Fourteenth Amendment) bars the intermingling of religious instruction with the compulsory education system of a state.**

The general principles applicable to the case *sub judice* are also clearly set forth in the *McCullum* case. That case too involved "the power of a state to utilize its tax-supported public school system in aid of religious instruction." Involved in that case was the practice of released time for religious instruction. A portion of the school time was allotted for religious instruction by teachers of separate religious groups. During these periods students were relieved of their regular secular studies to participate in the religious classes; those who did not choose to take religious instruction pursued their secular studies during the period. The Court, through Mr. Justice BLACK, found that by this practice, "the operation of the state's compulsory education system thus assists and is integrated with the program of religious sects \* \* \* This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." (At 209). Mr. Justice FRANKFURTER in his concurring opinion put it succinctly: "Illinois has here authorized the commingling of religious with secular instruction in the public schools. The Constitution of the United States forbids this." (At 212).

In his opinion Mr. Justice FRANKFURTER gives the historical background of the application of the principle of separation to the field of education:

"The modern public school derives from a philosophy of freedom reflected in the First Amendment." (at 214)

"Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people." (at 215)

"The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." (at 216)

As Mr. Justice JACKSON said in the *Everson* case:

"It (our public school) is organized on the premise that secular education can be isolated from all religious teaching so that the school can incul-

cate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion." (at 24)

These general principles, at least insofar as they are general principles, are beyond dispute. Their application to the particular situation involved in the instant case will be discussed hereafter, but plaintiffs are certain that defendants will not argue the conclusiveness of the holding in the *Everson* and *McCullum* cases that the public schools cannot be utilized in aid of religious instruction. The Court has so decided and the plaintiffs take the principle for granted.

### POINT III

**This case is not an attack upon God, an attack upon religion, or an attack upon the Bible.**

Plaintiffs make this point, before going into the main argument, in order that the parties to this suit may not argue at cross purposes over matters which are not relevant to the immediate cause concerned. For this purpose, in view of the collateral nature of the reasons advanced by the New Jersey Supreme Court in its decision and of the irrelevant material contained in the briefs by the defendants heretofore filed before the New Jersey Courts, plaintiffs feel that for clarity's sake it might be well to start by stating what this case is not about.

In matters of this nature sincere proponents of one side or another are often afflicted with a species of emotional astigmatism which causes them to confuse the issues and to direct their fire at matters which have no pertinence to the case. In the instant case, the briefs filed by the defendants in the State Court and, in fact, the

decision of the New Jersey Supreme Court, evinces such an emotional reaction. The sacred nature of the Bible, the reverence in which most Americans hold it, and the part that it has played in the education of most individuals, compel them to misconstrue the nature of such a constitutional question as is here involved. The reaction is almost reflex in nature: to ask the courts to strike down such a statute as the New Jersey one which compels the reading of the Bible in public school classrooms is construed as an attack upon religion, a repudiation of God, an assault upon the Bible.

It cannot be repeated too strongly that the present issue is not one between the religious and the godless, between the believer and the atheist. The First Amendment of the Constitution was not written by atheists. As Mr. Justice FRANKFURTER says in the *McCollum* case: "The deep religious feeling of James Madison is stamped upon the Remonstrance." (at 216) The famous Jeffersonian phrase "a wall of separation between church and state," is contained in a letter in which Thomas Jefferson affirmed his belief in God.<sup>1</sup> Nor have the justices of the United States Supreme Court, whose decisions have upheld the great principle of the separation of church and state, done so because of any hostility to religion or any disbelief in God. Mr. Justice BLACK disposed of any such allegation in the *McCollum* case when he said:

"To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would

<sup>1</sup> The Complete Jefferson, Padover, Saul K. (Ed.) (New York: Duell, Sloan & Pearce, 1943), Appendix D, p. 518.

be at war with our national tradition as embodies in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." (at 211)

The Unitarian church, the Baptist church, and the Jewish religious bodies have consistently been opposed to all practices which commingle governmental functions with religious.<sup>2</sup> With respect to the specific practice of Bible reading in public schools, an analysis of the cases which have come before State Courts shows that in almost every case the litigation has been initiated by people of religious persuasion, generally Catholics who objected to the use of the St. James version of the Bible as an infringement of the freedom guaranteed them by the First Amendment.<sup>3</sup>

<sup>2</sup> An eloquent and comprehensive brief against compulsory reading in the public schools was submitted to the 1926 legislature of Virginia, which was considering a bill similar to the New Jersey statute, on behalf of the Baptist General Association of Virginia, by Hon. John Garland Pollard, then Dean of William & Mary College and later Governor of Virginia. This Baptist Memorial is quoted at length in Johnson's "The Legal Status of Church-State Relationships in the United States" (University of Minnesota Press, 1934, pp. 118-126).

A similar stand has been taken for many years by adherents of the Jewish faith. Various resolutions by the Central Conference of American Rabbis against Bible reading in the public schools may be found in Joseph L. Fink: Summary of CCAR Opinion on Church and State as Embodied in Resolutions Adopted at Conferences Through the Years. (Philadelphia: Jewish Publication Society, 1948.) As long ago as 1906 the Central Conference of American Rabbis published a pamphlet on the general subject of "Why the Bible Should Not be Read in the Public Schools" and this pamphlet has been reprinted many times since.

<sup>3</sup> In the following cases the suits were initiated by Catholics: *Donahoe v. Richard*, 38 Me. 376 (Maine, 1854); *Hackett v. Brooksville Grade School*, 120 Ky. 508, 87 S. W. 792 (Kentucky, 1905); *Finger v. Weedman*, 226 N. W. 348 (South Dakota, 1929); *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (Colorado, 1927); *Ring v. Bd. of Educ.*, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442 (Illinois, 1910) and *Weiss v. District Bd.*, 76 Wis. 177, 44 N. W. 967 (Wisconsin, 1890).

The case of *Herold v. Parish Bd.*, 136 La. 1034, 68 So. 116, 56 L. R. A. 1915d, 941 (Louisiana, 1915), was brought by Jews and Catholics.

In the case of *Church v. Bullock*, 109 S. W. 115 (Texas, 1908), two Catholics, two Jews, and one unbeliever joined in initiating the suit.

A close reading of the decision of the New Jersey Supreme Court from which this appeal is taken shows that the major basis for its opinion was that it construed the case as an attack on religion and an attack upon God (R25). Thus construed it is easy for the Court or litigant to discover innumerable instances, statutory, judicial or practical, to prove that the Constitution of the United States does not intend to and has not obliterated recognition of religion and recognition of God. Plaintiffs submit, however, that all of these instances and all of these arguments are beside the point. This case does not attempt to drive religion out of the public consciousness or to create an enforced disbelief in God. It seeks simply to invoke the protection of the First Amendment for the religious as well as the irreligious; it maintains that it is to the benefit of both religion and government to keep their respective functions separate, and that the great truths of the Bible are best taught in the church, in the Sabbath and parochial schools, and by the parents—not in the public schools. There those truths may be explained and enforced, the spiritual welfare of the child guarded and protected, and his spiritual nature directed and cultivated in accordance with the dictates of the parental conscience. The Constitution does not interfere with, but protects, such teaching and such culture. It only banishes sectarian and theological tracts from the schools. It does this not because of any hostility to religion but because the men who adopted the Constitution and the great men since then who have interpreted it believe that the public good would thereby be promoted.<sup>4</sup>

<sup>4</sup> "It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education; that the Constitution forbids it to do so. Both legislatures and courts are bound by that distinction." Mr. Justice RUTLEDGE, in dissenting opinion to *Everson* case, at 52.

Religion does not need an alliance with the state to encourage its growth. Its weapons are moral and spiritual and its power is not dependent upon the force of a majority.

"United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated the better it is for both." *Board of Education v. Minor*, 23 Ohio St. 211, 13 Amer. Rep. 233.

#### POINT IV

**The reading of the Bible and the reciting of the Lord's Prayer in the public schools are religious services and exercises and religious instruction contrary to the First and Fourteenth Amendments of the United States Constitution.**

The precise questions here involved, namely whether required reading of the Bible and permissive reciting of the Lord's Prayer in the public schools of the state are contrary to the First Amendment, have never come before this Court. The nearest approach to consideration by the United States Supreme Court was in the case of *Clitheroe v. Showalter*, 284 U. S. 573 (1931), which arose in the State of Washington. Plaintiff filed a petition with the State Board of Education to force his local Board to require the reading of the Bible in the public schools of the state. (The case is unique in that it is the only case that counsel has been able to find in which an attempt was made to compel the reading of the Bible; in all other cases, the effort was to prevent Bible reading.) The state Board denied the petition on the ground that it raised a constitutional question (under the Constitution of the State of

Washington) upon which the Board had no jurisdiction, whereupon the petitioner asked the Supreme Court of Washington to issue a writ of mandamus requiring the Board to grant the petition. The state Supreme Court denied the issuance of the writ (159 Wash. 519, 293 Pac. 1000 [1930]), and the subsequent appeal to the United States Supreme Court was dismissed for lack of a substantial Federal question.

The question has come before numerous state Courts on various occasions. Eleven states, in addition to New Jersey, prescribe the reading of the Bible in public school classes.<sup>5</sup> Five other states make its use permissive.<sup>6</sup> No state requires the repeating of the Lord's Prayer and in only two other states besides New Jersey is it specifically permitted by statute.<sup>7</sup>

The statutes requiring the Bible to be read daily vary somewhat in details: e.g., Alabama requires "reading from the Holy Bible," not specifying the Old Testament; Delaware, like New Jersey, requires five verses; Pennsylvania requires the reading of at least ten verses; Georgia

<sup>5</sup> Code of Alabama, 1940, Title 52, sec. 542; Digest of the Statutes of Arkansas, 1937, Vol. I, sec. 3614; Revised Code of Delaware, 1935, Ch. 71, sec. 2758; Florida Statutes Annotated, 1943, Title XV, sec. 231.09; Code of Georgia Annotated, Title 32, sec. 705; Idaho Code Annotated, 1932, Vol. 2, Title 32, sec. 2205 *et seq.*; Kentucky Revised Statutes, 1944, Title XIII, secs. 158.170, 158.990; Revised Statutes of Maine, 1944, Vol. I, Ch. 37, sec. 127; Annotated Laws of Massachusetts, 1932, Vol. 2, Title XII, Ch. 71, sec. 31; Purdon's Pennsylvania Statutes Annotated, Title 24, sec. 1555; William's Tennessee Code Annotated, 1930, Vol. 2, Title 7, sec. 2343(4). Mississippi might be included in this list since its law requires instruction in the Ten Commandments. Mississippi Code, 1942, Title 24, sec. 6672.

<sup>6</sup> Burn's Indiana Statutes Annotated, 1933, Vol. 6, Title 28, sec. 5101; Iowa Code, 1939, Title XII, sec. 4258; General Statutes of Kansas, 1935, Ch. 72, secs. 1722, 1819; North Dakota Revised Code of 1943, Title 15, sec. 3812; Oklahoma Statutes Annotated, Title 70, sec. 495. South Dakota also permitted Bible-reading until 1931 when its law was revised to delete this provision. South Dakota Code of 1929, Vol. 1, Title 15, sec. 3103.

<sup>7</sup> Revised Code of Delaware, 1935, ch. 71, sec. 2758; Revised Statutes of Maine, 1944, Vol. I, Ch. 37, sec. 127.

requires at least one chapter to be read each day from the Bible, "including the Old and the New Testament." Arkansas, Florida, Kentucky, Maine, Massachusetts, New Jersey and Pennsylvania require that no comment be made. Georgia, Idaho and Tennessee have made statutory provision for excusing pupils during such reading at the request of parents or guardians, while in Kentucky and Massachusetts pupils who have conscientious scruples against the reading of the Bible may be excused from taking any personal part in the reading. The Maine statute provides that the pupils must give respectful attention.

In the state Courts, it is readily admitted, the cases which have sustained the reading of the Bible in the public schools exceed, numerically, those in which Bible reading has been interdicted. Bible reading has been upheld in Maine, Massachusetts, Kentucky, Georgia, Kansas, Iowa, Texas, Colorado, Michigan, Minnesota, and New York.

On the other hand, the reading of the Bible in the public schools has been struck down in Illinois, Louisiana, Wisconsin, and Ohio.<sup>10</sup>

<sup>9</sup> (National Education Association Research Bulletin, Vol. XXIV, No. 1, Feb. 1946, p. 26.)

<sup>9</sup> *Donahoe v. Richard*, 38 Me. 376 (1854); *Spiller v. Woburn*, 94 Mass. 127 (1866); *Hackett v. Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792 (1905); *Wilkinson v. City of Rome*, 152 Ga. 763, 20 A. L. R. 1535 (1921); *Billard v. Board of Education of Topeka*, 69 Kans. 53 (1904); *Moore v. Monroe*, 64 Ia. 367, 20 N. W. 475 (1884); *Church v. Bullock*, 190 S. W. 115 (1908); *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Pfeiffer v. Board of Education of Detroit*, 118 Mich. 560 (1898); *Kaplan v. Independent School District* (Minn.), 214 N. W. 18 (1927) and *Lewis v. Board of Education*, 151 Misc. 520, 28 N. Y. S. 164 (1935).

<sup>10</sup> *Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442 (1910); *Herold v. Parish Board*, 136 La. 1034, 68 So. 116, 56 L. R. A. 1915d, 941c (1915); *Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967 (1890); *Board of Education v. Minor*, 23 Ohio St. 211, 13 Amer. Rep. 233.

In two other well-reasoned cases, in South Dakota and Nebraska, no stand was taken on the exact question, but the language of the courts was clearly contrary to such a practice.<sup>11</sup>

The decisions in the state Courts have almost invariably been based upon the provisions of the respective state constitutions and in none of them have the First Amendment and the Fourteenth Amendment of the United States Constitution been precisely and directly invoked.

Accordingly, if the question were to be decided by a majority of those who have thus far voted, if the "weight of authority" were to be determined merely by numbers, the case for permitting Bible reading and the reciting of the Lord's Prayer in the public schools would prevail. An examination, however, of the reasoning in the respective cases, pro and con, considered in the light of the United States Supreme Court's decisions in the *Everson* and *McCullum* cases, leads ineluctably to the conclusion that such practices are unconstitutional.

Among the reasons advanced in support of Bible reading by those courts which have sustained the practice are such arguments as: (1) the Bible is non-sectarian; (2) no harm is done because pupils may be excused; (3) the fact that the Bible is read without comment makes its reading valid; (4) the amount of time spent on such religious exercises is so small as to make it unimportant (the de minimis rule); (5) the reciting of the Lord's Prayer and the reading of the Bible are effective means of quieting the pupils and preparing them for their lessons; and (6) the interesting reason stated by the New Jersey Supreme Court in the opinion from which this

<sup>11</sup> *Finger v. Weedman* (S. D.), 226 N. W. 348 (1929); *Freeman v. Schieve*, 65 Nebr. 853, 91 N. W. 826 (1902).

appeal is taken, to the effect that the Bible is accepted by the three great religions, the Jewish, the Roman Catholic and the Protestant, which constitute "the great bulk of our population" and that other religious groups in this country are "numerically small and, in point of impact on our national life, negligible," (R33) and thus, presumably, not entitled to the protection of the United States Constitution.

Even before one examines the validity of these arguments, they appear, *a priori*, to be evasions and excuses, attempts to minimize, by various devices, a practice which even to the courts which sustain it requires rationalization. Plaintiffs submit that these arguments are both trivial and irrelevant, and in actuality are proof that the reading of the Bible and the reciting of the Lord's Prayer in the public schools are improper, illegal and unconstitutional.

The basic point in the case is that the use of public statutes to compel the regular use of religious tracts in public schools is such an intermingling of the functions of religion and government as is barred by the First and Fourteenth Amendments.

The test set down by the United States Supreme Court in the *Everson* and *McCullum* cases is not a test of sectarianism. This Court has construed the First Amendment to bar not only preferences among religions but equal aid to all religions. It is not the fact that the Bible is a sectarian book (as plaintiffs will show hereafter) that makes its compulsory use in the public schools constitutionally illegal, but the fact that it is a work of intrinsically religious import and ritualistic significance that makes it so. The fact that the Old Testament, in its respective versions, is accepted by a number of religious groups, does not make its use, under the circumstances provided

in the New Jersey statute, a proper exercise of state power under the First Amendment.

None of the cases in the state courts which have permitted the reading of the Bible or the reciting of the Lord's Prayer has denied that they are religious works and services. The courts have only gone so far as to hold that they are not sectarian. Plaintiffs believe that this Court can take judicial notice that they are religious exercises.

In the Protestant, Catholic and Jewish religions the Holy Bible (in each case a different version) is deemed to be the inspired Word of God. The reading of it forms part of all religious services in the Christian or Jewish church. It is as much a part of the religious worship of churches in the land as is the offering of prayer.

There may be some dispute among the several sects as to the sanctity or the accuracy of certain portions of certain versions of the Bible, but all the different sects of Christians agree that the Bible is the inspired Word of God, that the Creator of the universe is its Author, and that it is a book of divine instruction as to the creation of man, his relation to, dependence on, and accountability to God. Although the Bible is considered a great literary work as well as a treasury of historical lore, its predominant character is a pious one. The historical and literary features of the Bible are of great value, but its distinctive feature is its claim to teach a system of religion revealed by direct inspiration from God.

It is true that among the sophisticates of today it has become fashionable to consider the Bible as a great work of literature and to stress its great moral values and its monumental prose while diminishing its religious significance. Plaintiffs submit that if these are the sole reasons that the proponents of Bible reading in the public schools

urge the compulsion of such a statute of the State of New Jersey, they are trivial reasons. It is precisely because the Bible is considered the Word of God that it derives its great value as literature and as a moral tract. The modern English poet and essayist, T. S. Eliot, has stated this clearly and wittily:

"I could easily fulminate for a whole hour against the men of letters who have gone into ecstasies over 'the Bible as literature,' the Bible as 'the noblest monument of English prose.' Those who talk of the Bible as a 'monument of English prose' are merely admiring it as a monument over the grave of Christianity. I must try to avoid the by-paths of my discourse: it is enough to suggest that just as the work of Clarendon, or Gibbon, or Buffon, or Bradley would be of inferior literary value if it were insignificant as history, science and philosophy respectively, so the Bible has had a *literary* influence upon English literature *not* because it has been considered as literature, but because it has been considered as the report of the Word of God. And the fact that men of letters now discuss it as 'literature' probably indicates the end of its 'literary' influence."<sup>12</sup>

Any question as to whether the reading of the Bible or the repeating of the Lord's Prayer are religious services or exercises is resolved by the very language of New Jersey Revised Statutes 18:14-78, which prohibits any "religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer \* \* \*." The New Jersey Legislature has clearly shown here that it considers the reading of the Bible and the repeating of the Lord's Prayer "religious services or exercises."

The reading of the Bible and the reciting of the Lord's Prayer in the classrooms, therefore, constitutes religious

<sup>12</sup> Eliot: Essays Ancient and Modern: Religion and Literature.



instruction and religious worship and come within the interdiction of the Constitution. Plaintiffs will show that they are also sectarian, but whether or not they are sectarian they are religious exercises and, therefore, unconstitutional.

"The reading of the Bible in school is instruction. Religious instruction is the object of such reading, but whether it is so or not, religious instruction is accomplished by it." *Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910).

The Wisconsin Supreme Court in the case of *Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967 (1890), held:

"That the reading from the Bible in the schools, although unaccompanied by any comment on the part of any teacher is 'instruction' seems to us too clear for argument. Some of the most valuable instruction a person can receive may be derived from reading alone, without any extrinsic aid by way of comment or exposition."

To permit—in fact to require—such religious instruction in the public schools is clearly a case of a state using its secular power to aid religion.<sup>13</sup>

## POINT V

**The reading of the Bible or the repeating of the Lord's Prayer is, *ipso facto*, in aid of one or more religions, and in preference of one religion over another.**

While plaintiffs maintain that religious exercises and readings in the public schools are unconstitutional regardless of whether they are sectarian, and that even if it

<sup>13</sup> "It (the constitutional inhibition) forestalled compulsion by law of the acceptance of any creed or the practice of any form of worship." *Conwell v. Connecticut*, 310 U. S. 296 (1940), at 345.

were possible for such exercises to be completely non-partisan and equable to all religions they would still be constitutionally improper, it is additionally clear that both the Bible and the Lord's Prayer are sectarian. Thus their use in the public schools is not only in aid of certain religions but in preference of one or more religions over others.

That the reading of the Old Testament is a preference for the Christian and the Jewish religions over all other religious sects, as well as over the free thinker, is too obvious to require argument. As the Illinois Supreme Court said in the *Ring* case, *supra*:

"The importance of most religious opinions and differences is for their own and not for a court's determination. With such differences, whether important or unimportant, courts or governments have no right to interfere. It is not a question to be determined by a court in a country of religious freedom what religion or what sect is right. That is not a judicial question. All stand equal before the law—the Protestant, the Catholic, the Mohammedan, the Jew, the Mormon, the Free Thinker, the Atheist. Whatever may be the view of the majority of the people the court has no right and the majority has no right, to force that view upon the minority, however small. It is precisely for the protection of the minority that constitutional limitations exist."

The same Court said:

"One does not enjoy the free exercise of religious worship who is compelled to join in any form of religious worship \* \* \*. The wrong arises not out of the particular version of the Bible \* \* \* but out of the compulsion to join in any form of worship. The free enjoyment of religious worship includes freedom not to worship."

Moreover, because of the various versions of the Bible which are extant, it is impossible in *any* classroom to read *any* version of the Bible without *ipso facto* favoring one particular branch of religion and discriminating against other branches of religion.

The various Protestant sects of Christians favor the King James version, published in London in 1611, while Catholics recognize the Douay version, of which the Old Testament was published in France in 1609. Each one claims for its own the most accurate presentation of the inspired Word. The versions differ in many particulars. There are differences of translation, many of which may seem unimportant to those not particularly concerned, although Catholics claim that there are cases of willful perversion of the Scriptures in the King James translation from which heretical doctrines and inferences have been drawn. Men like Wickliffe, Luther, Tyndale, for their translations of the Scriptures, have been commended and glorified by one sect, and denounced and anathematized by the other. Books containing such translations have been committed to the flames as heretical, and their translators, printers, publishers, and distributors persecuted, imprisoned, tortured, and put to death for participating in their production and distribution.

It is not necessary to go at length into the various differences among the versions of the Bible. A few examples should suffice. For example, the Hebrew Old Testament recognizes only 24 books, rejecting all the later books known as apocryphal; the Protestant or King James version of the Bible includes 39 books; and the Douay version has 45 books, all of which are recognized as the Inspired Word by Catholic Canon.

\* The noted Twenty-Third Psalm is different in different versions of the Bible: in the St. James version it begins,

"The Lord is my shepherd"; in the Catholic version, "The Lord ruleth me"; and in one of the smaller Christian sects it reads, "The Lord is my banker, my credit is good."<sup>14</sup>

The First Commandment differs in the several translations, and in one version of the Bible the Seventh Commandment is the one against the committing of adultery while in another version the Seventh Commandment reads: "Thou shalt not steal."

So far as the Lord's Prayer is concerned there can be no possible question of its sectarianism. To begin with, the Protestants and Catholics differ on the version to be used. To Catholics the concluding clause contained in the St. James version has taken on a Protestant connotation, and the Catholics omit the clause beginning, "For thine is the kingdom, etc."

To Jews the assertion that the Lord's Prayer is non-sectarian is an absurdity, for the context in which the Lord's Prayer is presented in the New Testament reveals it to be a prayer offered as avowedly contrary to Jewish practices. A reference to the several verses preceding the Lord's Prayer, discloses this fact: in the New Testament, Jesus, in devising the prayer, begins: "And when thou prayest, thou shall not be as the hypocrites are: for they love to pray standing in the synagogues \* \* \*. After this manner therefore pray ye: Our Father which art in heaven \* \* \*." Matthew, 6:5,9.

Differences in religious doctrine may seem immaterial to some, while to others they are vitally important. Sectarian conflicts, bitter animosities and religious persecu-

<sup>14</sup> Unity School of Christianity: see Charles Fillmore, Prosperity, Kansas City, 1938.

tions have had their origin in apparently slender distinctions. *Ring v. Board of Education, supra.*<sup>15</sup>

That Catholics consider it of importance is shown by such a work as "Morals in Politics and Professions," written by Father Francis J. Connell, Associate Professor of Moral Theology at the Catholic University of America, which bears the imprimatur of the Archbishop of Baltimore—Washington (1946). This presumably officially-approved work advises teachers of the Catholic faith who teach in schools where Bible reading is required to "bring her own Bible to class and read it to the pupils" (Chapter 12). The same book instructs the Catholic teacher not to recite the phrase "For thine is the Kingdom, etc." when the recitation of the Lord's Prayer is called for, because "in practice these words have taken on a Protestant connotation, so their use would constitute approval of heresy."

What is the position of a Protestant child in such an instance? As the Nebraska court said, in *Freeman v. Schieve*, 65 Nebr. 853, 91 N. W. 826 (1902):

"They have been obliged to give homage to God, not according to the dictates of their own consciences or the consciences of their parents, but according to the dictates of the conscience of the teacher."

In the *Ring v. Board of Education* case in Illinois the petitioners were Catholics who objected to the reading of the King James Bible because it was inconsistent with their doctrines. They objected, and the Court sustained their objection, that the teachers of the school, by reading the King James translation were teaching their children religious doctrine different from that which they were taught by

<sup>15</sup> "Religious expressions which are as real as life to some may be incomprehensible to others." *United States v. Ballard*, 322 U. S. 78 (1944), at 86.

their parents. "Why," said the Court, "should the state compel them to unlearn the Lord's Prayer as taught in their homes and by their church, and use the Lord's Prayer as taught by another sect?" By the same token, why should Protestant children, where they are taught by a Catholic teacher, be subjected to a Bible which is inconsistent with the religion taught them at home?

The Illinois Court said further:

"The Bible, in its entirety, is a sectarian book as to the Jew and Free Believer in any religion other than the Christian religion, and as to those who are heretical or who hold beliefs that are not regarded as orthodox. Whether it may be called sectarian or not, its use in the schools necessarily results in sectarian instruction. There are many sects of Christians, and their differences grow out of their differing constructions of various parts of the Scriptures \* \* \* the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorable or otherwise, with reference to the doctrines supposed to be derived from them. \* \* \* No test suggests itself to us, and perhaps it would be impossible to lay down one, whereby to determine whether any particular part of the Bible forms the basis of or supports a sectarian doctrine. Such a test seems impracticable. The only means of preventing sectarian instructions in the school is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise. The Bible is not read in the public schools as mere literature, or mere history. It cannot be separated from its character as an inspired book of religion."

To the same effect is the South Dakota case of *Finger v. Veedman*, 226 N. W. 348 (1929), in which the Court said:

"It may be argued that the peace and safety of the state is enhanced by the teaching of our youth morality, reverence, and wholesome religious beliefs. Speaking for myself, I think it is; but it does not follow that a reading of the King James version of the Bible in our public schools is essential to such teachings. Respondents frankly concede that the reading of any version would accomplish the same purpose. The difficulty in reading any version in the public schools seems to be in agreeing upon the version to be read and the person who reads it. But it is not necessary, for the teaching of religion to the youth, that it be taught in the public schools. We have many churches whose function it is to teach religion. The teaching of that particular subject in public schools seems to be so fraught with difficulties and dissensions that it is not practical to undertake it.

"The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as 'that man of sin,' and in which the translators express themselves as expecting to be 'traduced by Popish persons' who will malign them, because such persons desire to keep the people in 'ignorance and darkness.' We are satisfied that neither the evidence nor reason will justify us in sustaining the trial court's finding that the differences in the two versions of the Bible for a religious purpose are not substantial. History of the conflicts between Catholics and Protestants over those very differences refutes such conclusion. It makes no difference what our personal views may be as to the importance of the controversial words. As officers of the state, speaking for the state, neither we nor the teachers of the public schools can say that one side is right and the other wrong. We must leave that to the conscience of those involved."

There therefore can be no other conclusion than that the provisions of the New Jersey statute in question make it possible, nay inevitable, for one religion to be favored and others to be discriminated against. The New Jersey law does not set forth which version of the Old Testament or of the Lord's Prayer should be used. In fact, it seems obvious that if the legislature attempted to specify a specific version, such an attempt would be clearly discriminatory and illegal. It is not less discriminatory and illegal when the election is left to the discretion of a particular school board, a particular principal, or a particular teacher. In any case, whoever does the selecting, it works a discrimination and a preference.

## POINT VI

The fact that children are not compelled to remain in the classroom while the Bible is being read or the Lord's Prayer repeated, but may withdraw therefrom, does not cure the evil of the statute, but, in fact, admits it.

Defendants assert and plaintiffs admit that the School Board of the defendant Borough of Hawthorne will permit any child to withdraw from the classroom during the reading of the Bible or the repeating of the Lord's Prayer. The claim is that this presumed freedom cures the constitutional defect in the law and in the practice. This contention, although the basis of some decisions, has been determined to be without merit, both by the United States Supreme Court and by state courts.

It should be noted that the New Jersey statute in question does not provide for a withdrawal from the classroom of any aggrieved student but that such withdrawal is permitted by a regulation of the Board of Education of Haw-

thorne. There may actually be some question as to whether the Board has the right to make such a regulation and it might reasonably be maintained that the Board by permitting such withdrawal is actually in violation of the statute. Conceding the legality, however, of the Board's action, this practice does not condone the statute but is, in fact, a tacit admission that the religious practice required by the statute is an infringement of individual rights.

This argument in favor of Bible reading in the schools has been answered by the Illinois Supreme Court, in the *Ring* case, *supra*, when it said:

"That suggestion seems to us to concede the position of the plaintiff in error. The exclusion of a pupil from the part of the school exercises in which the rest of the school joins, separates him from his fellows; puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma, and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution."

The Wisconsin Supreme Court, in the case of *Weiss v. District Board*, *supra*, held similarly:

"The answer of the respondent states that the relators' children are not compelled to remain in the schoolroom while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the relators have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excused for any cause from a stated

school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excused pupil loses caste with his fellows and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the Constitution seeks to establish and protect and puts a portion of them to serious disadvantage in many ways with respect to the others."

gain, in the same case:

"It is said, if reading the Protestant version of the Bible in school is offensive to the parents of some of the scholars, and antagonistic to their own religious views, their children can retire. They ought not to be compelled to go out of the school for such a reason, for one moment. *The suggestion itself concedes the whole argument.* (Italics supplied)

"And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused." *Herold v. Parish Board*, 136 La. 134, 68 So. 166, 56 L. R. A. 1915d, 941 (La., 1915).

mitting such withdrawal, this case puts it, is "an *action of discrimination*."

missive withdrawal either as provided in the statute regulation of a particular Board or simply by whim of a particular teacher, proves the inconsistency of any contention that the reading of the Bible and the reciting of the Lord's Prayer in the public schools are not religious exercises or exercises. If the reading is not of a religious nature and is educational within the requirements of any school study, then why cannot the attendance be compul-

sory? If attendance cannot be compelled because such reading presupposes a belief in the particular version of the Bible which is being read or the particular version of the Lord's Prayer which is being recited, then it must follow that it is a religious reading and exercise and thus contrary to the First Amendment.

Mr. Justice FRANKFURTER in his concurring opinion in the *McColum* case also rejected the right to withdraw as justification for an invalid religious practice because of the inherent pressure by the school system involved. Mr. Justice FRANKFURTER commented that: "The fact that this power has not been used to discriminate is beside the point" (at 227). He went on:

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. \* \* \* The children belonging to those non-participating sects will themselves have inculcated in them a feeling of separation when the school should be the training ground for habits of community. \* \* \* As a result the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." (at 227)

It is interesting, and not a little amusing, to compare these comments on the question with the Colorado case of *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927). In the Colorado case the Court said:

"It is urged that to absent themselves for a religious reason 'subjects the pupils to a religious stigma and places them at a disadvantage.' We cannot agree to that. The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations, but never one for neglecting them or absenting himself from them."

In the Colorado case it is assumed that those who are excused during the readings will ridicule those who remain; in the other cases cited, that those who remain will ridicule those who are excused. In this disagreement, however, both conclusions reached may well be correct. *Either one results in discrimination and consequently in oppression.*

The discussions on this point by Mr. Justice FRANKFURTER and by the state Courts which have been cited all concern themselves with the fact that withdrawal by a child holds the child up to scorn or ridicule. In these unsettled and hysterical times such an action on the part of a child may do more than subject the child to ridicule—it may be actually dangerous. Many persons today have a tendency to equate opposition to Bible reading in the public schools and the general principle of the separation of church and state with atheism. The same sort of people consider atheism synonymous with Communism. A child courageous enough to ask to be excused from Bible reading thus subjects himself to the danger of being deemed Communistic, un-American, and possibly seditious. That this is not a far-fetched possibility is indicated even by a reading of the opinion in this case by the New Jersey Supreme Court. The latter part of that opinion dealt with this pres-

ent-constitutional test as being, in fact, an attack upon "our way of life." It spoke of organized atheistic society and totalitarianism in the same breath and the implications of the language of the Court are clear (R36). Moreover, the Attorney General of the State of New Jersey, who is counsel for the defendant in this case, recently made a public statement in which he purported to tie up the plaintiffs in this case with Communism.<sup>16</sup>

If the New Jersey Supreme Court, if the Attorney General of the State of New Jersey, can equate opposition to Bible reading in the public schools as an infringement of the United States Constitution with Communism, how can one expect children of public school age or their unsophisticated parents to make any more independent decision when confronted with a non-conforming student?

## POINT VII

Other reasons advanced to justify the reading of the Bible and the reciting of the Lord's Prayer in the public schools are legal and practical fictions.

### (a) The "no comment" provision.

Several of the state statutes prescribing the reading of the Bible provide, as New Jersey's statute does, that the Biblical verses be read "without comment," and some of the cases upholding the practice consider that such a restriction on Bible reading cures the practice of any sectarian tinge.

<sup>16</sup> "Parsons Charges Communist Role in Bible Reading Attack

"Communist money was behind the recent Hawthorne suit in which efforts were made to suppress the reading of Bible verses in public schools. Attorney General Theodore D. Parsons told a Passaic group this week that: 'We have checked into that case and have found that the money behind that suit came from people who would destroy our form of government just as much as those Communist leaders arrested in New York. \* \* \*'" Paterson Evening News, June 23, 1951.

Even if the First Amendment of the United States Constitution were construed as applying only to sectarianism, the "no comment" provision would still be a legal fiction. However, the First Amendment, as construed by this Court in the *Everson* and *McCollum* cases, and as has been shown above, did more than merely impose a duty to be neutral among religions; its purpose, as shown, was to bar the equal treatment of all religions; it was a ban on state aid to religion, not merely a requirement that no particular religion be favored.

Like the provisions which permit a pupil to absent himself during the reading of the Bible, the "no comment" provision is an admission of impropriety. Of no other book used in the school curriculum is it required that no comment be made. The legitimate function of our public schools is to impart secular knowledge to the students, and comment in that connection with such instruction is not only unrestricted but essential, whereas the Bible does not lend itself to use for secular instruction without comment and analysis. As the Court said in the South Dakota case of *Finger v. Weedman*, *supra*, the very limitation placed on comment in connection with the reading of the Bible "discloses the purpose of the order of the school board to enter the field of religious instruction, but not into sectarian controversy." The same court pointed out further that if the Bible were read only for moral instruction, comment would be necessary, but read without comment, it is an act of devotion and worship, "a form of religious instruction, and not a part of the secular work of the school."

**(b) The *de minimis* contention.**

Some courts in upholding Bible reading have argued that an insignificant fraction of the school's time is consumed in such reading: *e.g.*, *Wilkerson v. City of Rome*, 152 Ga. 763, *supra*. This contention does not require extended

comment. In Mr. Justice FRANKFURTER's phrase, such an assertion is "to draw a thread from a fabric" (*McCullum* case, at 231).

The Wisconsin court in the *Weiss* case, *supra*, expressed it well.

"The mere fact that only a small fraction of the school hours is devoted to such worship in no way justifies such use as against an objecting taxpayer. If the right be conceded, then the length of time so devoted becomes a matter of discretion. If such a right does not exist, then any length of time, however short, is forbidden."<sup>17</sup>

(c) "Quieting the pupils."

One of the most interesting reasons for justifying the reading of the Bible or the reciting of the Lord's Prayer is that they serve the purpose of "quieting pupils and preparing them for their daily studies." This purpose was advanced by the lower New Jersey court in the instant case and also expressed in such a case as *Billard v. Board of Education of Topeka*, 69 Kan. 63, *supra*. We doubt that the use of the Lord's Prayer or the Bible as a sedative would meet with the approval of most proponents of the practice; and certainly there is an obvious contradiction between this contention and the assertion that the repetition of the Lord's Prayer and the reading from the Bible serve to inculcate principles of piety, justice, and benevolence. The reading of the Lord's Prayer and chapters from the Bible can be either an influence for good or a soporific—they cannot be both at the same time.

<sup>17</sup> "Who does not see that the same authority . . . which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" Madison: Memorial and Remonstrance Against Religious Assessments, annexed as an Appendix to this Court's opinion in the *Everson* case, at 65.

Like the other reasons advanced from time to time to justify these practices, the statement that the purpose is to quiet the pupils is another legal and practical fiction by which a practice improper on its face is sought to be justified for reasons which are not germane. As a matter of fact, there is a certain amount of intellectual dishonesty in proposing such excuses: certainly the legislature in authorizing the repeating of the Lord's Prayer, or prescribing the reading of the Bible was not concerned with matters of classroom discipline, and if the quieting of the pupils is so pressing a matter there must be many other methods of achieving this and without resorting to the use of a religious text which necessarily arouses religious dissention.

**(d) The longevity contention.**

Defendants in their answer make the assertion that the statutes in question have been in existence for a long time and that, by some mysterious alchemy of venerableness, have thus been transformed into constitutional enactments.

Plaintiffs believe that there is no merit to this point and it requires little comment. The cases uniformly hold that mere antiquity cannot save an unconstitutional statute. Time cannot validate what was not valid in the first place. *Browne v. Connor*, 138 Me. 63, 21 A. 2d 709; *Price v. Clawns*, 180 Md. 532, 25 A. 672; *Page v. Carr*, 232 Pa. 371, 81 A. 430.

**(e) The "majority rule" argument.**

The latest reason advanced by a responsible Court to justify the reading of the Bible is found in the New Jersey Supreme Court's opinion in this case. The Court decided that the Old Testament is not a sectarian book because "it is accepted by three great religions; the Jewish, the Roman Catholic and the Protestant, and; at least in part, by others.



• • • The adherents of those religions constitute the great bulk of our population. There are religious groups other than the Jewish, the Roman Catholic and the Protestant but in this country they are numerically small and, in point of impact upon our national life, negligible." This, it is submitted, is a new departure in constitutional interpretation. If the constitutionality of a statute is to be determined by the interests of a majority, what function does the United States Supreme Court have left? The Bill of Rights was written to protect the individual and the minority—the majority needs no protection. As Mr. Justice HUGHES said: "It is the individual \* \* \* who is entitled to equal protection of the laws—not merely a group of individuals or a body of persons according to their numbers." *Mitchell v. Interstate Commerce Commission*, 313 U. S. 80 (1941), at 97. As Mr. Justice FRANKFURTER recently put it:

"The treatment of its minorities, especially their legal position, is among the most searching tests of the level of civilization obtained by a society. It is better for those who have almost unlimited power of government in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that we are perhaps in danger of forgetting how much blood it cost to establish the Bill of Rights." *Dennis v. United States*, 71 Sup. Ct. 857, 887 (1951).<sup>18</sup>

<sup>18</sup> How much more truly American in principle, how much more truly religious, how much more truly Christian than this narrow view of the New Jersey Supreme Court is that contained in Roger Williams' famous tract, "Bloody Tenent of Persecution" (contained in Louis M. Hacker's "The Shaping of the American Tradition, Columbia University Press, New York, 1947) page 108:

"\* \* \* Sixthly. It is the will and command of God, that (since the coming of his S<sup>on</sup> and the Lord Jesus) a permission of the most Paganish, Jewish Turkish, or Antichristian consciences and worships, be granted to all men in all Nations and Countries: \* \* \*

Tenthly, an enforced uniformity of Religion throughout a Nation or civil state, confounds the Civil and Religious, denies the principles of Christianity and civility, and that Jesus Christ is come in the Flesh. \* \* \*

Twelfthly, lastly, true civility and Christianity may both flourish in a state or Kingdom, notwithstanding the permission of divers and contrary consciences, either Jew or Gentile."

## CONCLUSION

The public schools of this country are our greatest institution for the inculcation of the American principles of democratic freedom and equality. They should be a unifying influence in the community and not a force to enhance the divisiveness of our people and to lay stress upon differences. The school system is one of the few broad areas left in our country where religious intolerance can be overcome. It is one place where the child is not yet primarily a Protestant, a Catholic, a Jew, or a non-believer, but an American among other Americans.

Public schools are the principal instruments and sources of popular education because they exert, more than any other institution, an influence which promotes homogeneity among our citizens, whose ancestry is drawn from all quarters of the globe. If religious worship, religious exercises, religious services, or sectarian instruction, no matter how lofty their purpose, be permitted in the public schools, parents will be compelled to expose their children to doctrines which they consider contrary to their own conscience, or else bear the burden of supporting out of their pockets religious training in a sect other than their own.

As the Court said in the Nebraska case of *Freeman v. Schieve, supra*:

"It might reasonably be apprehended that such a practice besides being unjust and oppressive, to the persons immediately concerned, would \* \* \* tend forcibly to the destruction of one of the most important if not indispensable foundation stones of our form of government. It will be an evil day when anything happens to lower the public schools in popular esteem or to discourage attendance upon them by children of any class."

When the public school refuses to teach religion, it invades the rights of no one. It does not reject religion nor

does it foster it. It leaves the subject entirely alone and justifies its own existence and support by general taxation on the ground that its function is to provide secular rather than religious education. Religious instruction in the public schools, whether it consists of reading the Bible, singing hymns, or offering prayer, is, in respect to the taxpayer, a coerced support of religion. Such instruction, especially if it is compulsory, is incompatible with the principles of religious liberty and freedom of conscience. Exclusion of Bible reading from the public schools as well as reciting the Lord's Prayer, is the one course that may be pursued with absolute safety, with the assurance that no one's rights are being trampled upon and with a knowledge that perfect justice has been done. Johnson and Yost: Separation of Church and State in the United States (U. of Minnesota Press., 1948).

Mr. Justice FRANKFURTER's language bears repetition:

"The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart."  
(*McCullum case*, at 231)

**Plaintiffs therefore submit that Revised Statutes 18:14-77 and 18:14-78 are unconstitutional, that the judgment of the Court below should be reversed, and that both the State of New Jersey and the Board of Education of Hawthorne should be restrained from complying with either of said sections of the law and enjoined from the reading of the Old Testament and the reciting of the Lord's Prayer in the classrooms, either on a compulsory or on a voluntary basis.**

Respectfully submitted,

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